

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHEILA DEWEESE	:	ORDER
	:	DTA NO. 818659
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1994 and 1995.	:	

Petitioner, Sheila DeWeese, 1143 Blake Avenue, 2nd Floor, Brooklyn, New York 11208, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1994 and 1995.

On August 30, 2001, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 4, 2001, petitioner, appearing *pro se*, filed a letter in opposition to dismissal. On September 20, 2001, the Division of Taxation, by Barbara G. Billet, Esq. (Kathleen D. O'Connell, Esq., of counsel), submitted documents in support of dismissal. The parties were required to present supporting arguments by September 29, 2001, which date commenced the 90-day period for issuance of this order. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. Petitioner, Sheila DeWeese, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) dated October 2, 2000, seeking a review of notices of disallowance issued to petitioner dated September 29, 2000. The notices of disallowance concerned claims for refund in the total amount of \$1,488.00, which petitioner claimed on her 1994 and 1995 income tax returns.

2. Petitioner’s conciliation conference was held on February 22, 2001. Petitioner appeared *pro se* at the conciliation conference.

3. BCMS subsequently issued a conciliation order to petitioner (CMS No. 183061) dated April 6, 2001, which denied petitioner’s request and sustained the statutory notices concerning both 1994 and 1995 dated September 29, 2000.

4. On July 31, 2001, a petition seeking an administrative hearing to review the conciliation order dated April 6, 2001, was sent by petitioner to the Division of Tax Appeals by United States Postal Service Express Mail. The address listed by petitioner on her petition is 1143 Blake Avenue, 2nd Floor, Brooklyn, New York 11208. The envelope in which the petition was delivered contains a United States Postal Service (“USPS”) postmark of July 31, 2001.

5. On August 30, 2001, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the conciliation order in this matter was issued on April 6, 2001, but that the petition was not filed until July 31, 2001, or 116 days later.

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (“Division”) submitted the affidavits of Carl DeCesare and James Baisley, employees of the Division. The Division also submitted a copy of the certified mail record (“CMR”)

containing a list of the conciliation orders allegedly issued by the Division on April 6, 2001, including one issued to petitioner, and a copy of the conciliation order.

7. The affidavit of Carl DeCesare, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the CMR.

8. The Data Management Services Unit in BCMS prepares the conciliation orders and the CMR which are then forwarded to a BCMS clerk assigned to process the conciliation orders. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned by an internal computer application which stores a block of certified control numbers and assigns such numbers. The certified control number is printed at the top of the conciliation order cover letter and on the CMR. A clerk verifies that the certified control number on the CMR is the same as that on the cover letters and the actual orders. The conciliation orders and the CMR are picked up at BCMS by an employee of the Division's Mail Processing Center. Each page of a CMR is a separate CMR for the conciliation orders listed on that page only, and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual CMR for the receiving postal employee to initial.

9. A one-page CMR contains a list of the conciliation orders allegedly issued by the Division on April 6, 2001, including an order addressed to petitioner, Sheila DeWeese, 1143 Blake Avenue-2nd Floor, Brooklyn, NY 11208. The certified control numbers on the CMR do not run sequentially. The certified control number corresponding to the entry listing petitioner's

name and address is P 811 144 790. The single page of the CMR is date stamped April 6, 2001 by the Colonie Center branch of the USPS in Albany, New York. The CMR contains a space for the signature of a postal service employee verifying receipt of the articles listed on the CMR, and it bears initials in the space provided. At the bottom of the CMR, on the page on which petitioner's name and certified control number are listed, the number "6" has been filled in as the "Total Number of Pieces listed by Sender." There are six articles of mail listed on that page. There is also a space for "Total Number of Pieces Received at Post Office," which also bears the number "6."

10. The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a notice is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office. In this particular instance, the postal employee affixed a postmark dated April 6, 2001 to the CMR, wrote in the "Total Number of Pieces Received at Post Office" as "6," and initialed the CMR to indicate that six pieces were received. In addition, the U.S. postmark on the CMR is the official acknowledgment by the U.S. Postal Service for the pieces of mail recorded on that mail record. According to Mr. Baisley's affidavit, his knowledge that the postal employee wrote in the "Total Number of Pieces Received at Post Office" for the purpose of indicating that six pieces were

received is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number received by writing in the number of pieces on the mail record.

11. The CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Baisley's staff on the following day after its initial delivery and is then delivered to the originating office. On April 6, 2001, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Sheila DeWeese, 1143 Blake Avenue, 2nd Floor, Brooklyn, NY 11208 to the Colonie Center branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. A member of Mr. Baisley's staff obtained a copy of the CMR delivered to and accepted by the post office on April 6, 2001 for the records of BCMS. The procedures described in Mr. Baisley's affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and these procedures were followed in mailing the piece of certified mail to petitioner on April 6, 2001.

12. In response to the Division of Tax Appeals' Notice of Intent to Dismiss Petition, petitioner submitted a letter on September 4, 2001. The letter indicates that petitioner's conciliation conference was in April 2001 after which time she mailed a petition to the Division of Tax Appeals, on April 21, 2001, by regular mail. When petitioner became aware that the Division of Tax Appeals had not received her petition, she sent it again by Express Mail on July 31, 2001. Petitioner contends that her petition was timely filed when she submitted it by regular mail in April 2001.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 681(b) the conciliation order in this case and the underlying notices of disallowance would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals.

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Mr. DeCesare and Mr. Baisley in support of its position that the conciliation order was issued to petitioner on April 6, 2001, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such orders (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each order is generated, a certified control number is

assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the order was issued and the certified control number assigned to the order.

Second, the Division established that the general issuance procedure was followed on April 6, 2001 in the generation and mailing of petitioner's order dated that day. Specifically, the affidavits of Mr. DeCesare and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as April 6, 2001 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figure "6" on the only page of the April 6, 2001 CMR, signifying the total number of pieces of mail listed, has also been written next to "Total Number of Pieces Received" and a Postal Service employee has initialed the form as the receiving employee. Unlike the situation in *Matter of Roland (supra)*, the affiant (here Mr. Baisley) also states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case as to the conciliation order.

C. Petitioner does not challenge the method of mailing the order, nor does she dispute its receipt. She does assert that she filed a timely petition challenging the order in April 2001, mailed by regular mail. However, she has no proof of the same. The proof of mailing and delivery submitted by the Division proves that proper mailing procedures were in fact followed in this case. Petitioner has offered nothing to rebut the fact that the conciliation order was properly mailed. Petitioner was required to file her request for a hearing before the Division of Tax Appeals within 90 days of April 6, 2001, or no later than July 5, 2001. Since the request was not made until July 31, 2001, it is time barred.

D. The Division of Tax Appeals' Notice of Intent to Dismiss dated August 30, 2001 is sustained, and accordingly, the petition of Sheila DeWeese is dismissed.

DATED: Troy, New York
November 29, 2001

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE